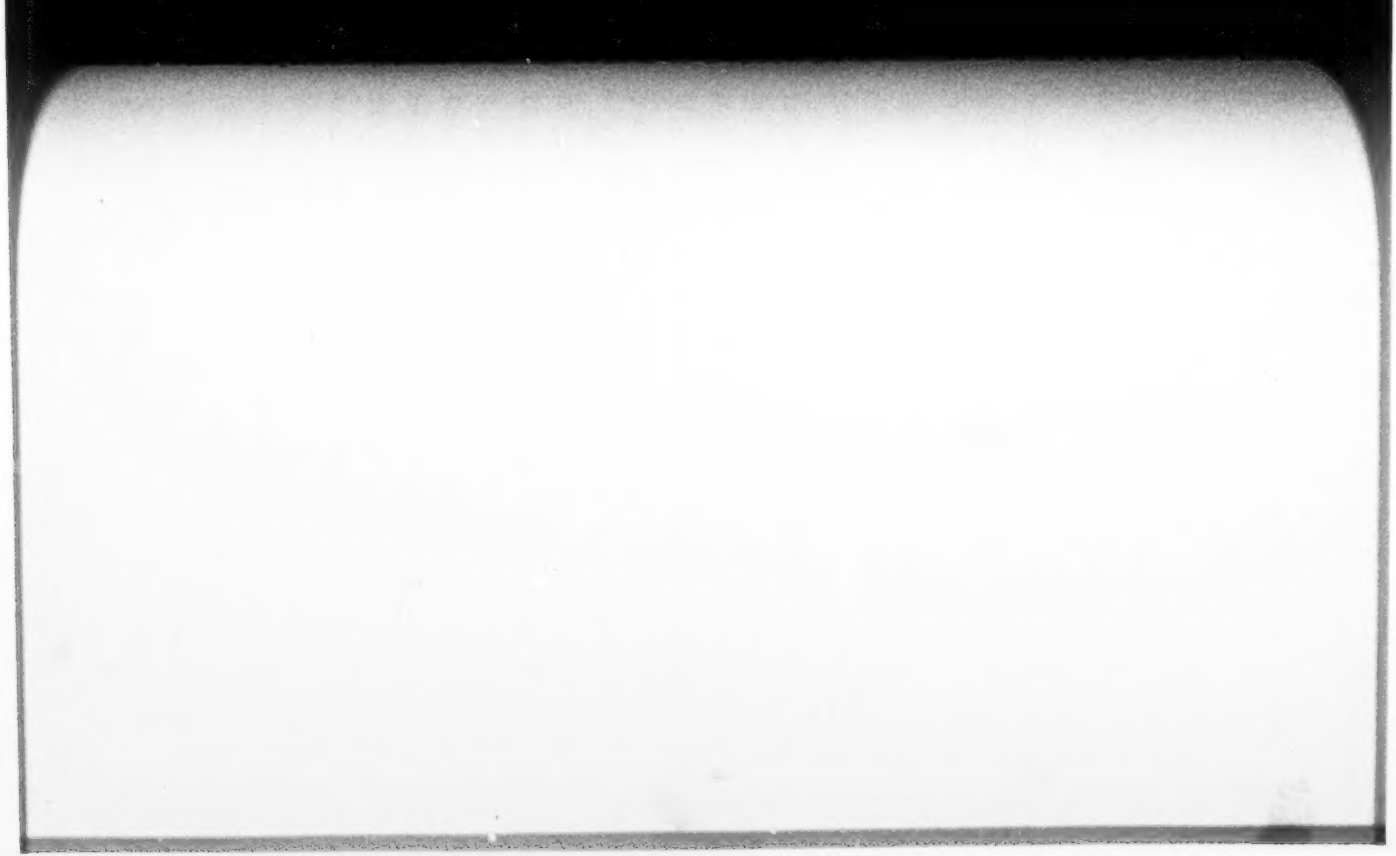

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, *Appellants*,
v.
THE OFFICERS AND CREW OF THE U. S. S. *Mangrove*. } No. 24.

THE OFFICERS AND ENLISTED MEN OF THE U. S. S. *New York*, U. S. S. *Indiana*, AND U. S. S. *Wilmington*,
v.
THE OFFICERS AND CREW OF THE U. S. S. *Mangrove*. } No. 34.

Reply of U. S. S. *Indiana* to the Brief of U. S. S. *Mangrove*.

Some matters stated in the brief filed on behalf of the *Mangrove* in answer to the *Indiana's* claim require a reply.

Signals by Boat Flags.

The *Mangrove* maintains that the test of signal distance in this case is the ability to signal by small boat flags, since the *Mangrove* had these, but no large signal flags. This asserts the principle that signal distance is a term whose meaning is varied in accordance with the signalling ability of the vessel.

It is first to be pointed out that this is wholly inconsistent with the denial by the *Mangrove* that signalling

by gun signals is a proper test. If the question is, whether with the means at hand the *Mangrove* could have called the *Indiana* to her assistance, then gun signals are to be considered as much as boat flags. Gun signals are an officially recognized method of long distance signalling in emergencies; boat flags are officially used for signalling at short distances but have no recognition or use for long distances. The *Mangrove* can not logically admit boat flags as a test of signal distance and deny the admission of gun signals.

The *Mangrove* asserts that an unusual method of signalling is to be adopted as the test because it was available. Any such principle admits gun signals.

The principle is wrong. The test is whether the *Indiana* was within signal distance by any known method authorized by official regulation. Signal distance is the distance at which authorized signals can be understood, not the distance at which the special form of signals in the possession of the capturing vessel can be understood. The statute fixes a uniform rule, not a variable rule.

The right of the *Indiana* to share depends upon her position and not upon the instruments for signalling possessed by the *Mangrove*. As well might the absence of an efficient signal officer be the test as the absence of efficient signal apparatus.

Admit the *Mangrove's* point as well taken and then suppose the positions of the *Indiana* and *Mangrove* reversed. Then because the *Indiana*, supposed to be the capturing vessel, had large signal flags, the *Mangrove* could share in the prize as within signal distance of those flags, although it is said that under the existing conditions, the *Indiana* has no share because the *Mangrove* lacked such usual equipment. The larger and better fitted vessel, less in need of help (this position being supposed) must divide its prize; the smaller vessel, lacking equip-

ment, apt to require aid, is treated as independent of outside help.

The statute has made a simple but rigid test by a fact which does not often admit dispute. Disputes should not be encouraged by adding complexity to the statutory condition.

Effective Aid.

It is denied by the *Mangrove* (appellees' brief, pp. 6, 7) that the *Indiana* was in position to render effective aid, if required. The appellees contend that the *Indiana's* distance made her non-effective. The words: "Under such circumstances and in such condition as to be able to render effective aid, if required," do not make the distinction of distance as claimed by appellee. The sharing distance is signal distance. This being settled, the next question is the effective condition and circumstances of the vessel. Was she aground, a wreck, or without motive power? Using the word of the statute, was she an effective vessel? In determining this question, the matter of distance, elsewhere determined by the statute, is not to be reintroduced. No case can be cited, of all the many discussing signal distance, where any such further qualification based on distance is approved or even urged.

How can it be contended that a battle-ship of the most powerful modern armament, including 13-inch guns, in sight at a distance of about seven miles would not be effective aid to a vessel of the size and armament of the *Mangrove* in capturing a vessel of superior force? It is not questioned that the *Panama* was a swifter vessel than the *Indiana*, as she was of the *Mangrove*, but the moral effect of the *Indiana's* guns, high-powered and effective at a great distance, as well as their physical potentiality, can not be overestimated. We have pointed out in our brief the

evidence (add. 158, q. 14; add. 171, q. 7) showing that the covers were taken off the *Panama's* guns and replaced. We have also shown (brief, pp. 39–41) the testimony of the officers of the *Panama* that they saw the *Indiana* in the distance prior to the boarding of the *Panama* by Dayton. Lieutenant Decker (rec. 40) says:

"The chase was within range of our eight- and thirteen-inch guns. She could not have escaped us if she had evaded or resisted the *Mangrove*"

Lieutenant Dawson (rec. 42) says:

"The prize, from the time she was sighted, was within easy range of the guns of this ship, and could not *have* possibly have escaped us *whether* success she might have had in evading or resisting the *Mangrove*."

Chief Yeoman Murray (rec. 43) says:

"Had the prize successfully resisted or evaded the *Mangrove*, she could not have escaped the *Indiana*, as she was within range of the guns of the main battery."

Under these circumstances it seems quite unnecessary to discuss in detail whether the presence of the *Indiana* within signal distance was under such conditions as to render effective aid, if required. American battleships have a notable record of efficiency and this can not be denied to the *Indiana* because deficient in speed alone.

Movements Prior to 6.07.

Our learned adversaries have discussed (appellees' brief, pp. 27–34) at great length in their brief the movements of these vessels prior to 6.07, when the capture took place. The uncertainty of their data is frankly disclosed. What possible advantage can result from this? The critical time was 6.07. The issue is whether the vessels

were in signal distance at that minute. It is not contended that at that time their distance was less than seven or more than fourteen miles and we know that the *Mangrove* was still and the *Indiana* moving toward the *Mangrove*. The best evidence of their distance at 6.07 is the testimony of the witnesses as to what was seen and the evidence of their movements between that and 6.45. This has been produced and fully discussed.

Now it is proposed to throw light on the problem by calculating the positions of these three vessels at 6.07 from their movements between 4.30 and that hour. No such calculation can be made with sufficient exactness to aid in settling a dispute reduced already to a difference of only seven miles. The data are all too indefinite in the following as well as other particulars:

(1) The minute when the *Mangrove* left the *Indiana*.

(2) The speed of the *Mangrove* until she saw and made haste for the *Panama*.

(3) The hour when she increased her speed to reach the *Panama*.

(4) Her exact course during any part of this time—this resting solely on oral recollection.

(5) The *Indiana's* exact speed,—"full speed 5.05, slow speed 5.48; then full speed, with orders to make 85 turns" (add. 202), with no evidence of the number of turns until after 5.48, or of the resulting speed.

(6) The exact course of the *Indiana*.

(7) Consequently, the angles of the *Indiana's* and *Mangrove's* courses.

The issues, now sufficiently difficult, are confused by seeking to throw light upon them from data which possess far more uncertainty than those relied on to prove their movements after 6.07.

Reversal on Questions of Fact.

The appellee's brief cites a decision of this court in regard to reversals of decrees of the lower court on questions of fact and maintains that such reversal is adjudged only upon very clear evidence of mistake on the part of the court below. In the case cited, this court heard the case on the same record as two courts below. The rule governing its action is stated very clearly in the syllabus (*The Grace Girdler*, 7 Wall. 196):

"This court will not readily reverse in a case of collision depending on a mere difference of opinion as to the weight of conflicting testimony, where both the District and Circuit Courts have agreed."

Even there three judges dissented. Here is an entirely different record. This court takes up the case for the first time without the benefit of a hearing below on this record; consequently the rule cited has no application.

Mistakes of Witnesses.

We admit that our witnesses have made mistakes. No witness examined at length on either side can have stated all the facts with exact accuracy. This record puts the court in possession of a more nearly complete and a more accurate story of the afternoon's work than remains in the memory of any single witness. The right conclusion is reached not by dwelling on the errors of any particular witness, but by discerning the hypothesis which most nearly reconciles the testimony derived from the several sources,—the oral testimony of things seen at 6.07 from (1) the *Indiana*, (2) the *Panama* and (3) the *Mangrove*, (4) the evidence of record, (5) the testimony as to motion and speed, and (6) the proof of possible signal distance.

Our case rests primarily on the overwhelming evidence of persons on the *Indiana* of what they saw. It is impossible that they could have seen these things at the distance claimed by the *Mangrove*. Supplementing this is the conclusion of all these experienced witnesses that, seeing what they did, they could then have read flag-signals. Whatever may have been the exact number of miles, they all agree that the things they saw made them certain that they could have read signals. Then the evidence of motion and speed and of recognized long-distance signalling, although not in itself conclusive, displays the credibility of the story of the witnesses and the reasonableness of their opinion.

Against this, proof of individual mistakes is of no avail.

The Number of Witnesses.

Comment is made (appellees' brief, p. 55) upon the fact that with a crew approximating five hundred but nineteen persons on the *Indiana* were called as witnesses. Attention has already been called (*Indiana's* brief, p. 29) to the fact that these are representative men from various places and capacities on the ship.

Other witnesses, after such a number, would have been purely cumulative. A rehearsal of the story by as many more would not add to proof already conclusive. There is a limit to the proper protraction of a record. The presumption when so many give concurring testimony is that others who were in like situation would also concur if called.

The varying and separated conditions under which the testimony was taken preclude also the possibility of collusion among the witnesses and make conclusive the presumption that others would corroborate their testimony.

The Rule of Distribution.

The decree of the court below awards the entire amount of the prize to the *Mangrove*. In our assignment of error, we maintain that the *Indiana* should be included, but we do not allege error in the grant of the entire prize to the captors. This position is common to the *Mangrove* and the *Indiana* and is fully argued in the *Mangrove's* brief (pp. 2–5). We maintain that the "vessel or vessels making the capture," described in R. S. § 4630, for comparison with the force of the prize, constitute a different class from the vessels "within signal distance" of the "vessel or vessels making the capture" described in § 4632. The comparison under § 4630 in determining relative force and consequently the amount of prize to be distributed is with the *Mangrove* alone. The *Indiana* does not come in under that section, but as a vessel within signal distance under § 4632. The argument is fully stated in the *Mangrove's* brief and it is unnecessary to repeat it here.

GEORGE A. KING,
WILLIAM B. KING,
Proctors for the U. S. S. Indiana.

Office Supreme Court U. S.
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APR 1 1901
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

October Term 1900.

THE OFFICERS AND ENLISTED MEN OF THE U. S. S. *New York*, *Indiana* AND *Wilmington*, Appellants, v. THE OFFICERS AND ENLISTED MEN OF THE U. S. S. *Mangrove*, Appellees.	No. 445.

BRIEF FOR THE APPELLEES, ON MOTIONS FOR LEAVE TO TAKE FURTHER PROOF.

Libel was filed by the United States Attorney in the District Court for the Southern District of Florida, on the 11th day of May, 1898, and a decree of condemnation was rendered May 27, 1898, against the steamer *Panama*. The *Panama* appealed to this court, where the decree of the court below was affirmed, February 26, 1900.

The issue between the appellants and appellees in this case of the *Mangrove*, was joined between all the parties June 1, 1898. That issue is, as shown by the pleadings, Whether the *Mangrove* alone is entitled to the proceeds of the prize—the *Panama*—or whether the other ships, the *Wilmington*, the *New York*, and the *Indiana* are entitled to share with it.

All the depositions and proof of all the claimants had

been filed by and on June 1, 1898. See record and certicate of clerk, hereto attached.

Before decree in this case counsel for the *Mangrove* was before the Judge in Chambers, and called his attention briefly to a few points, but practically submitted his case on brief. See his affidavit attached. Mr. Hayden, of counsel, as it was understood, was also before the Judge prior to the decision of the case (see affidavit hereto of clerk), and all parties filed briefs. See same affidavits.

The report of the Prize Commissioner was filed October 3, 1898, giving all the prize to the *Mangrove*.

The case remained in *that attitude for nearly two years*, until June 15, 1900, when the court rendered the decree appealed from.

All parties "chanced the decision" on the evidence they had taken, and now at this late date motions are made in the hope that the appellate court will give them what does not appear to have been asked of the court below, "another chance." In support of the motion, counsel for the *New York* say, page 13:

> "The standing interrogatories upon which (the depositions) are relics of the days of sailing ships and smooth-bore guns. It is not surprising that they should have failed to draw from the witnesses full and complete statements of all the circumstances attending the capture."

Admitting solely for the sake of argument that this statement could be made as to the interrogatories *in preparatorio*, appearing on pages 4, 5, and 6 of the record, the depositions in the present case were taken upon the ten interrogatories propounded on pages 21 and 22 and elsewhere in the record. These are modern, comprehensive, and skillfully adapted to elicit all the information needed in the decision of questions like that at bar, be-

tween rival ships claiming to share in prize under the present statutes of the United States.

The counsel for the *Indiana* and the *Wilmington*, in their brief, to account for this motion at this date, quote on pages 25 and 26, the circular from the Secretary of the Navy of date September 10, 1898, in which the Department notifies commanding officers and others entitled to prize money, etc., that their claims will be "promptly settled by the Auditor of the Navy Department, through the Navy Department, and that the employment of an attorney is entirely unnecessary."

But every commanding officer must have known that this circular did not refer to disputes as to the right of different ships to share in prizes, and that the auditor could only settle rights and shares in unlitigated cases.

Besides, these parties had *all begun their litigation* with each other in the District court *four months before this circular was issued.*

Again, one year after this circular all the present attorneys for the claimants participated as counsel for them in the argument, viz., November 3, 1899.

Grounds of Motion.

Counsel for the motions seem to find it very difficult to set forth succinctly their grounds. The captain of the *Indiana* makes his motion, and "for cause of this motion he respectfully refers to the affidavits of himself and others, herewith presented," and seeming to fear that the facts presented may not be sufficient, he adds: "and to the considerations set forth in the brief and argument of the counsel filed therein."

Counsel for the other motion show for their ground that "by reason of the exigencies of the naval service, they were prevented from adducing full and adequate proof while the cause was pending," etc., without any at-

tempt to show that there were any exigencies upon the *New York, Indiana* or *Wilmington* that did not to an equal degree affect the *Mangrove*.

In reply we contend:

a. That the officers and crews of all the claiming vessels had exactly equal opportunities, and that all of them enjoyed every facility. It was sailor-man against sailor-man. The captain of each ship was furnished with exactly the same interrogatories; each commanding officer testified himself, and took the testimony of such others of the officers and crew as he deemed necessary. All this in the spring of 1898. Depositions were sworn to before the captain, or other officer, and there was no limit to the power to take testimony, except the belief, after full consultation, that all the evidence had been taken that was available or requisite.

b. Every ship's company put in such extracts from the log of the vessel as would help to make out the ship's case. These logs were all made up by officers who were naturally alert for prize money, and of course they omitted nothing from the records they were keeping that would tend for such claims as they might make.

c. These logs are official records of the *res gestæ*. They give a contemporaneous history of facts and are far more reliable than any expressions of opinion, even if made at the time. *A fortiori*, these logs are more reliable than opinions formed from memory.

d. Every captain seemed to rest his case largely upon the extracts from his log. The logs of the *Indiana* and the *New York* are set forth in their respective claims, and repeated by witnesses. All these logs are entitled to fair consideration. Some contradictions in other testimony are produced, but these are largely as to matters of opinion. Messrs. McCammon & Hayden began their argument, page 12 of Brief, by saying:

> "The depositions of the nine officers taken on behalf of the *New York*, *Indiana* and *Wilmington*, and the logs of these vessels for the watch during which the *Panama* was captured, are in substantial accord and all are in direct conflict with the eleven depositions of the *Mangrove's* officers and men. The court below accepted the *Mangrove's* evidence as true and rejected all of the evidence offered by the other vessels as untrue."

Our contention is, that—as will appear by examination—the decision of the court below was made mainly upon the facts disclosed by the logs of the *Indiana* and the *New York*.

The Law.

Before discussing the facts or the opinion of the court below, we call attention to what we conceive to be the true meaning of the cases cited for the motions, premising that while motions to take further proof are, in prize cases, treated more liberally than are applications at law for a new trial, yet that the true rule is that no court below will permit suitors to deliberately take chances with the court, "and if unsuccessful, then to move for a new trial (or leave to take further testimony) on the ground of surprise."

The maxim *vigilantibus non est dormientibus leges subveniunt*, has some field of operation in every court which has a reasonable desire to administer justice methodically.

The rule to be gathered from all the cases, as laid down by the Supreme Court long after the decision of every case cited by either of the counsel for appellants, is as follows:

> "An order for further proof is always made with extreme caution and only where the ends of

justice clearly require it." *The Gray Jacket*, 5 Eall. 342.

Referring to the old cases, some of which were cited for the motions.

In the *Atalanta*, 3 Wh. 409, new testimony was ordered by this court, the appeal being by the captors from a judgment in favor of Foussat, claimant, Foussat being the only witness for himself. The court was prepared to reverse the case, because of suspicious circumstances connected with his evidence, but because the proceedings had been very irregular and Foussat was in condition to explain these circumstances by outside testimony, it was ordered that this evidence be taken. This is no precedent for an application in a case like this, where no irregularities appear, where each party had the fullest opportunity, all its witnesses being on board ship, to examine them, where each did examine all that were deemed necessary, and where, never having, so far as the record shows, asked below for the privilege of taking more evidence, the defeated parties appeal and then, after looking over the record, conclude themselves to ask in this court, for the first time, the privilege of taking another chance.

In the case of the *London Packet*, 2 Wheat. 372, where no testimony was allowed, no facts are considered.

In the case of the *Grotius*, 8 Cr. 456, the court ordered further evidence, because only one man had been put aboard as prize master, and there was a conflict between the evidence of this man and the witnesses for the ship, as to whether there had been a capture, the captain having been left in charge of the navigation of the ship and of her papers.

In the schooner *Adeline*, 9 Cr. 244, the captors were appellants, and there were many claimants; the court

ordered the property of eighteen released and six condemned, and allowed further testimony as to others whose national character and proprietary interest did not distinctly appear. Some of the claimants *were residents of France*, and the court said:

> "As, indeed, the master has not been able to swear directly as to the proprietary interest of the cargo, but simply says that the goods were, as he presumes and believes, the property of the shippers or the consignees, perhaps in strictness, *further proof might have been required in the court below* as to the whole cargo. It was not, however, moved for there by the captors, *and as we are satisfied as to the claims* which we shall restore, it would be useless now to make such a general order."

Here the court clearly intimates that a different rule applies to a lower and an upper court, and it is distinctly held that where the court is "satisfied" as to claims, it will not allow further evidence.

Counsel have quoted the case of the *Frances*, 8 Cr. 348, but did not quote the same case when it was up in 8 Cr. 335, where further proof was denied when "the original evidence is very strong to prove that the shipment made of D. and F. (which was the issue) was entirely a consignment.

In the case of the *Frances*, Graham's claim, 8 Cr. 348 which was cited, further proof was allowed because the credibility of affidavits made was impaired by the non-production of letters mentioned in the affidavits. In that case the claimants' own evidence had suggested the necessity of further testimony.

In another case arising out of the capture of the *Frances*, 8 Cr. 354, cited by counsel, the question turned on whether a consignment and an accompanying bill of lading vested the property in the consignee. Claimant

under the peculiar circumstances of that case was allowed further evidence, in order that he might show that he had accepted the conditions named in the first consignment before the capture and on the arrival of another vessel. This was undoubtedly a liberal ruling, but the testimony was not in any sense cumulative. It went to another point.

After all the cases which have been cited by counsel had been decided, this court, in the well-considered case of the *Sallie Magee*, refused an order for further testimony largely, as will be seen by the opinion, because "between the filing of the claim and the time when the decree was rendered, more than two years elapsed; there was time to communicate repeatedly with Rio," whence the proof was to come.

That case is precisely in point. Two years and more elapsed in the case at bar, between the time of the taking of the testimony, May, 1898, and the trial in the summer of 1900. The parties in the *Sallie Magee* could communicate with Rio at that time, say once in two months. In this case, so far as appears from the proofs, the parties could all the time since the Spanish war have communicated with their counsel once a week, and they had for many months the power to take new testimony from those on shipboard every day in the week.

The court said, in the *Sallie Magee*, after citing authorities:

> "The result is always in the discretion of the court, and that discretion is controlled by the circumstances of each case. The order is made with great caution, because of the temptation it holds out to fraud and perjury."

In this case the new testimony the appellants ask to introduce could come only *from persons directly interested*, and therefore under temptation, if such a thing could be.

Besides, the testimony to be taken could only be cumulative. The court adds to the sentence we have used above, "the order is made only when the interests of justice clearly require it."

This language was re-affirmed in the *Grey Jacket*, 5 Wall. 342.

The Facts.

Do the interests of justice require that in this case the cumulative evidence of other officers and men on board the *New York*, *Indiana* and *Wilmington* be admitted? We deny that Judge Locke decided the case upon the testimony of the eleven witnesses of the *Mangrove* against the nine officers of the other three vessels and their logs, and insist that he did not count witnesses, but weighed testimony and gave consideration almost entirely to the logs of the vessels, as the captains themselves seem to have done when they put them in. In these logs the facts are stated, and there the case would rest even if the thousand and more witnesses on the claiming vessels should give their opinions.

The inevitable inference to be drawn from the logs of the *Indiana* and the *New York*, coupled with testimony coming from the *Wilmington*, the *Indiana* and the *New York*, are:

1. That neither the *Wilmington*, *New York* or *Indiana* was in signaling distance of the *Mangrove* at the time of her capture of the *Panama*. This appears from the efforts that were being made just before the capture to ascertain the colors of the *Panama*. Signals were being exchanged between the other three vessels, but none were sent or attempted to be sent, to the *Mangrove*, which was nearest to the *Panama*. This was because the *Mangrove* was out of signaling distance. Events show *that at that time this fact was recognized*.

2. That the *Indiana* and the *Mangrove*, from the speed at, and the time within, which they were travelling away from each other prior to the capture, must have been from fourteen to sixteen miles apart at the time of the capture, and not only because of this great distance but because of the direction of the wind day-time signaling was absolutely impossible.

3. That a like conclusion must be reached by estimating the distance travelled by the *Indiana* and the *Mangrove* in approaching each other, after the capture, until the *Indiana* fired its shot across the bow of the *Panama*.

4. That the shot fired across the bow of the *Panama* by the *Indiana*, more than half an hour after she was captured, is a fact totally inconsistent with the claim now set up by the *Indiana*, that her officers knew all that had been going on between the *Mangrove* and the captured vessel.

I. As to signaling.

At 5.25 Lieut. Almy, officer of the deck on the *Wilmington*,

> "sighted a merchant steamer to the n'd and e'd and signaled to the flagship *New York* general signal 6216 compass N. E. (smoke of a steamer is seen in the direction indicated by compass signal)," p. 46, Rec.

This, of course, being so exact, is from the log of the *Wilmington*. The flagship *New York*, having received this signal,

> "made signal to the *Indiana* 'What is the character of the strange vessel bearing east?' At 5.45 *Indiana* replied, 'Merchant steamer.' At 5.47 *New York* signaled to *Indiana* 'What flag is the steamer flying?' At 5.50 *Indiana* answered 'Can not see.' At 6.06 *Indiana* signaled this ship 'Strange vessel changed course east.' At 6.06 *Indiana* signaled this ship

'*Mangrove* near strange steamer,' the *Indiana* being then distant not more than 400 yards from *this ship*."

This is given by Ensign Henry C. Mustin, aide to commander-in-chief on the *New York*, at pages 51 and 52 of the record. Now the capture of the *Panama* by the *Mangrove* took place at 6.07 P. M. Commanger Everett says:

"When Ensign Dayton went aboard it was 6.07, and I so entered that fact in the ship's log book." Record, p. 33.

The witnesses on the *Panama* testified that it was just before six o'clock when the capture took place.

Now here it is evident from these facts that from 5.38 until 6.06 this signaling was going on between the flagship and the *Indiana*, the purpose of which was to ascertain the nature of the strange vessel which had been reported. It was the duty of the *Indiana* to give the information desired; if she was so far from the *Panama* as to be unable to make out the colors, it was her plain duty to inquire of the *Mangrove*, which was then near the *Panama* and could have given the information; and this the *Indiana* undoubtedly would have done if at that particular moment it had seemed to the officers on board that they could obtain for the commander-in-chief in that way the information he was seeking. The fact that no log of the *New York* or of the *Indiana* shows any effort to establish signal communication with the *Mangrove* at that time, ought to be conclusive to show that the latter was out of signal distance.

Note also that during all the time of this signaling and until 6.06 the *Indiana* kept on sailing away from the *Mangrove*, never suspecting from what it could see that there was any prize in sight.

And we ask in this connection especial attention to the reasons given by Captains Taylor and Chadwick, in their affidavits supporting their motions, when explaining why the colors of the *Panama* were not visible from the *Indiana* when the *New York* was making her inquiries.

Captain Taylor in his affidavit says:

> "That the failure to see the colors of the *Panama* at 5.55 *was rather natural*, as the flag was blowing out but little, etc. etc. * * * * Whereas signal flags in many instances may be read off with ease, when the ensign at the staff, especially if not blowing out, may be difficult to make out with certainty."

And Captain Chadwick says, pages 4 and 5 of McCammon & Hayden's brief.

> "The affiant was able to observe the movement of the *Panama* the *Indiana* and the *Mangrove*, but could not make out the colors of the *Panama*, because there was very little wind at the time and *such as there was blew from the Panama to the New York, so that the colors may have been end on.* * * * * *The affiant could have read the signals at this distance, had the wind been such as to blow the signal flags in a direction normal to the line of sight.*"

Now if when the *Panama* was coming towards the *New York* the wind was nevertheless strong enough to *blow her flag towards the New York*, how much stronger would have been the force of the wind upon any signal flags the *Mangrove* might have waved when she was going at the rate of eight or nine miles directly against that wind? Of course it would have been just nine miles stronger than the wind which put the flag of the *Panama* end on, rendering it plainly impossible for the *Panama*, even if distance had permitted, to signal because the wind was not, as Captain

Chadwick says, "such as to blow the signal flags in a direction normal to the line of sight."

Judge Locke in his opinion, page 56 of the Record, says:

> "Signal distance must be determined by the circumstances and requirements of the vessels at the time."

And again, on the same page, he says:

> "What such distance is, is a more difficult question. I fail to find any evidence upon that point in any recent case, but in the case of the *R. E. Lee*, 1 Lowell, p. 36, after careful consideration and examination of the testimony in the case and of every case cited therein, it was considered that from five to six miles was the average distance at which flag signals could be read, and eight miles was testified to by one of the witnesses as being the utmost limit of vision in reading naval day signals."

Thus, we contend that the affidavits themselves, upon which the motion for the new trial in this case is made, supplement the decision of Judge Locke, and show conclusively the correctness of his decision, by reasoning not employed by him, because the explanations these officers give, of the failure to signal or to attempt to signal the *Mangrove*, at the distance she was, were not before him.

II. As to the speed at, and the time within, which the *Indiana* and the *Mangrove* were traveling from each other, Judge Locke's opinion mainly turned on this point. He said:

> "At 4.30 P. M., as shown by the official log of the *Indiana*, which is considered the most reliable testimony upon that point, signal was made from that vessel to the *Mangrove* to come within hail and to

proceed to Key West after receiving the mail. Judging from all the testimony it is fair to presume that it was a little before 5 P. M., at the time the *Mangrove* left the *Indiana*, and at ten minutes past five the *Indiana* went ahead at full speed, at about ten miles an hour, toward the south'ard to communicate with the flagship. At about 5.25 P. M. the *Wilmington* discovered smoke to the northeast, and reported the same as a steamer to the northeast, to the flagship. At 5.45 P. M. the flagship inquired of the *Indiana*, then approaching from the north'ard, 'What is the character of the strange vessel,' and the reply was, 'Merchant vessel.' The inquiry was then made? 'What colors does the strange vessel carry?' The reply of the *Indiana*, at 5.55 P. M., was 'Can not see.' Five minutes later, or at six o'clock, the *Indiana* appears to have turned to the northeastward and made full speed toward the *Panama* (the prize) and the *Mangrove*. Seven minutes later the prize surrendered and was boarded by the *Mangrove*. * * * The *Indiana* and *Mangrove*, which had been together between 4.30 and 5.00 o'clock, had been moving away from each other for nearly an hour, the one at the rate of about 10 knots, the other about 8 knots an hour, and the distance passed over must have been about 12 or 15 knots at least, or from 14 to 16 miles is but a fair measure of their distance apart."

The testimony to support this reasoning of the Judge is found in the evidence of Lieutenant Decker, of the *Indiana*, where he gives an extract from the official log of the *Indiana*, at bottom of page 35 of the record, as follows:

"At 4.30 made signal to *Mangrove*. She came within hail and was given orders to proceed to Key West after receiving mail. 5 P. M. mustered the crew to quarters. [This followed after the *Mangrove* had left, which must have been, therefore, before 5, *Mangrove's* witnesses say 4.30.] At 5.10 went ahead

full speed to communicate with F. At 5.15 sighted strange brigantine-rigged steamer to east'ard. * * * At 6.00 headed for her."

And in the evidence of same witness, in answer to interrogatory 3, at page 40 of the record:

"* * * agoing about ten knots. The *Mangrove* was seen to head for steamer, and at about 6.10 the steamer stopped."

And in the evidence of Ensign Henry C. Mustin, of the *New York*, aide to the commander-in-chief, who says, bottom of page 51 and top of page 52:

"At 6.05 the *Indiana* signaled this ship, 'Strange vessel changed course east.' At 6.06 the *Indiana* signaled this ship, '*Mangrove* near strange steamer,' the *Indiana* being then distant not more that 400 yards from this ship. * * * The *Indiana* at the end of the signaling was approaching this ship from the direction of the strange steamer."

Note that the witness states that the *Indiana* did not turn until after the last signal at 6.06.

The *Mangrove*, Captain Chadwick says in his affidavit, on page 6, of McCammon & Hayden's brief for a new trial, according to the best of affiant's recollection, steamed at eight knots as a rule, *and at the most, nine.* If the *Mangrove* could, as is stated in this affidavit asking for further evidence, steam nine knots, it should be admitted that when carrying the mails she was steaming nine knots; and it goes without saying that she was steaming at her utmost speed when a possible prize was in sight in the direction she was going. If instead of calculating the speed of the two vessels at eight and ten knots, they were steaming at nine and ten knots respectively, then even if the *Mangrove* had been going only an hour, the

vessels were nineteen knots, or over twenty-one miles apart when the *Indiana* turned, even if the turning was at six o'clock, as appears by the log of the *Indiana*. This upon the supposition that they had been steaming apart one hour, as Judge Locke estimates. But it must be recollected that the *Indiana* when steaming at full speed toward the *New York* would require some time within which to turn, say five minutes; and it may be that when the log speaks of her heading at six o'clock for the *Mangrove* and *Panama*, it speaks of the turn as of the instant when the order was given. This would account in part for the apparent discrepancy between turning at six and turning, as Ensign Mustin said she did, after signaling at 6.06. But it is perfectly clear from the official log of the *Indiana* as given on p. 35 which contains a clause about mustering the crew that is omitted from the same log on p. 44, that the *Mangrove* had sailed away from the *I.* before 5 o'clock and this of course increased the distance above estimated.

Will the court, in view of the decisions quoted, tempt the men on the claiming ships to controvert this evidence by giving their opinions that the ships were nevertheless in signal distance?

It is to be remembered that the distance between the *Panama*, the prize, and the *Indiana*, from the time the *Panama* was first sighted, had probably not increased, but decreased after the time the *Indiana* first sighted the *Panama*, because both ships were sailing in the same direction, southwestwardly. The distance, however, between the *Mangrove* and the *Indiana*, which is the point in question, was all the time widening until the latter turned. All this appears from the affidavit of Captain Chadwick in this motion for a new trial (see page 3 of the brief of Messrs. McCammon & Hayden) where he says:

"At this time the U. S. S. *Indiana* was coming toward the *New York* from the direction in which this steamer had been reported—that is to say, *from the northeast.*"

III. What was the distance travelled by the *Mangrove* after the capture of her prize and the *Indiana* after she had turned from within 400 yards of the *New York*, towards each other? We have seen that the evidence varies as to the time when the *Indiana* completed her turning and headed for the *Mangrove*. The log of the *Indiana* says she turned at 6.00. Ensign Mustin, of the *New York*, says, page 52 of the record: "The *Indiana* at the time of the signals was approaching this ship (the *New York*) from the direction of the strange steamer," and the last signal he had given was at 6.06. It was at 6.45 that the *Indiana* fired across the bows of the *Panama*, when she was coming. The *Indiana* then had been travelling, of course, at her full speed towards the prize, from 35 to 45 minutes, say 40 minutes. Reckoning her speed at 12 knots—and she is a 16-knot ship and must have been able to make then 12 knots—she had travelled 8 miles; reckoning it at 10 knots, she had made 5⅔ knots. But the *Mangrove* had been coming towards her, with her prize, for at the very least a half an hour, because the capture had been made at 6.07. If the *Mangrove* had made four knots, this added even to the lesser estimate, would make 9⅔ knots, or about 11 miles. But this did not cover all the distance, because the *Indiana* was certainly not close enough to see and understand the situation when she fired this shot. She seemed either not to have known that the *Panama* had been captured, or to have supposed that the *Panama* had escaped; and therefore she must have been a long way off when she fired. We can only conjecture the distance. The *Indiana's* guns

would carry 12 miles, and more. The *Indiana* had gotten close enough to see the colors of the Spaniard, and she fired.

IV. Just why she did this remarkable thing her log does not explain. But it does explain, see page 37 of the Record:

> "The Spanish colors were hauled down at 6.48. Sent officer and prize crew of the following men (naming them). The prize proved to be the *Panama*, from Barcelon, five days out, etc."

The log fails to note that Ensign Dayton was already on board as prize master, put there by Captain Everett of the *Mangrove*, and that under the latter's direction Mr. Dayton was steaming the *Mangrove* towards the *Indiana*.

What makes this firing across the bow of the *Panama* particularly strange is, that although it is said to have occurred at 6.45, the sun does not set in the latitude of Havana on the 28th of June, until 7 o'clock.

Is it possible for the court to believe the correctness of the opinions expressed by the witnesses for the *New York* and the *Indiana*, that the *Indiana* was all the time within signal distance of the *Mangrove*, when here, in plain daylight, half an hour and more after this capture took place, the *Indiana* did not really know the situation?

HERBERT & MICOU,
For the Mangrove.

H. C. Herbert
Benj. Micou.

Affidavit of Clerk of Court.

STATE OF FLORIDA, } ss:
Duval County, }

Eugene O. Locke, being duly sworn deposes and says: My name is Eugene O. Locke. I am Clerk of the U. S. District Court for the Southern District of Florida, and was so during the year 1898 and ever since. As clerk I have had charge of the papers and records in the case of the U. S. *v.* S. S. *Panama* and Cargo, and have had correspondence with the attorneys representing the claimants to prize money.

Correspondence and briefs were not "filed" but briefs were submitted to the judge of said court, to my personal knowledge by attorneys representing the claims of the *Mangrove*, and the *Wilmington* and *Indiana*. I have those briefs now before me. It is my recollection that brief was also submitted by attorney representing the *New York*, but I do not find such brief among the papers in the clerk's office. I know that Mr. Browne, representing the officers and crew of the *Mangrove*, was before this court, and left his brief with the judge, and that afterwards Mr. Hayden from Washington, whom I understood to be representing McCammon & Hayden, attorneys for the officers and crew of the *New York*, and also to be representing Wm. B. King, attorney for the officers and crew of the *Wilmington* and *Indiana*, was before the judge at chambers, and I understood him to be here in behalf of said claimants. McCammon & Hayden did file a brief; it is now before me.

The judge did not hand down his decree as to award of the prize money till some time after Mr. Hayden left here.

I had letters before the hearing, from the several attorneys interested in claiming the prize money, at various times, which I did not preserve, and can not recall exactly, but my understanding derived from them was, that they would submit the question on the depositions filed, and brief; and no extension of time was asked for for taking of testimony, or for other purpose, but all seemed anxious—from their correspondence—to get a decision.

I have no interest in any question connected with the distribution of said prize money.

EUGENE O. LOCKE.

Sworn to and subscribed before me March 27th, 1901.

WILLIAM J. LOCKE,
Notary Public,
State of Florida at Large.

[SEAL.]

U. S. DISTRICT COURT, } ss:
Southern District of Florida, }

I, Eugene O. Locke, clerk of said court, hereby certify that in the case of the United States *vs.* S. S. *Panama* and Cargo, Prize, all the depositions and claims as to share in the prize money by the *New York*, *Wilmington* and *Indiana* were filed in this court in May, 1898.

That objections to the report of the Prize Commissioner was filed by McCammon & Hayden, proctors for U. S. S. S. *New York* and by W. B. King, proctor for U. S. S. *Indiana* and *Wilmington*, on May 12, 1900.

That certified copy of the log of the U. S. S. *Indiana* was filed as evidence on June 1, 1900.

That brief of William B. King, attorney for commander, officers and men of U. S. S. *Wilmington* and U. S. S. *Indiana* was submitted to the court before decree was made. Also brief of McCammon & Hayden for *New York*.

That decree was made on June 15th, 1900.

That before decree was made, Jefferson B. Browne had been before the court and handed in brief, and Mr. Hayden had been before the court.

That all of above appears from the papers and entries on file and of record in my office as clerk of said court.

In witness whereof I hereunto set my hand officially, and affix the seal of said Court at Jacksonville in said District, this 27th day of March, A. D. 1901.

[SEAL.]

EUGENE O. LOCKE,
Clerk.

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Affidavit of Jefferson B. Browne.

STATE OF FLORIDA, }
County of Monroe, } *ss:*

Before me, a notary public in and for said county and State, personally came Jefferson B. Browne, who being duly sworn deposes and says:

My name is Jefferson B. Browne; I am of counsel for the officers and crew of the U. S. S. *Mangrove*, in the matter of the distribution of the proceeds of the Spanish prize *Panama*. Some time after the determination of the case of the U. S. *v.* the *Panama*, by the Supreme Court of the United States, I applied to Judge Locke of the District Court for the Southern District of Florida, to know when he would take up the matter of the distribution of the proceeds, and he advised me that he would hear it any day upon reasonable notice given to parties on the other side, and on April 23d I gave notice to Messrs. McCammon & Hayden, and the U. S. District Attorney, that I would call the matter up on May 8th. A copy of my letter of transmittal is hereto attached, and on May 2d, I received a letter from McCammon & Hayden, stating among other things, that "if they were not able to appear in Jacksonville on the 8th, they would submit the case on brief," which letter is hereto attached. On the day I left Key West for Jacksonville, I received a letter from them asking me to postpone the hearing, as they had some matters which would take them to Jacksonville later, and they did not care to make two trips, as Jacksonville was a long way from Washington. As there were some other matters set for hearing before the District Court at that time, in which I was engaged, I could not accede to their request, and as Key West in point of the time it takes to reach there, and the fare thereto, is far from Jacksonville as Washington is, my reasons for submitting it at the time stated were as strong as theirs for wanting it postponed.

On the day set for hearing, a telegram was received by the U. S. District Attorney, which he brought to the attention of the court, asking that time be given Messrs. McCammon & Hayden, and Geo. A. & W. B. King to file

briefs, and the court so informed me on the hearing, and that he would let me submit my case at that time, and I should furnish them each with a copy of my brief, and that he would require them to furnish me with a copy of theirs, and that I would be permitted to file a supplemental brief, if I desired. I did as the court instructed, and received copies of briefs from these gentlemen, and filed a short supplemental brief. As there was to be no oral argument of the case by counsel for other claimants, I merely called the court's attention to one or two points, and submitted my brief, the entire time not occupying a half hour, and the case was practically submitted on written briefs. All the briefs were before the court not later than the latter part of May, and the opinion was not handed down until June 15th.

JEFFN. B. BROWNE.

Sworn to and subscribed before me this 25th day of March, A. D. 1901. J. M. PHIPPS,
[SEAL.] *Notary Public.*

April 23d, 1900.

Messrs. MCCAMMON & HAYDEN,
Washington, D. C.

MY DEAR SIRS:

I am sending you with this notice of hearing of the matter of the distribution of the proceeds of the S. S. *Panama* and Cargo, as I have been advised that you represent the officers and men of the U. S. S. *New York*.

I trust that it will be convenient for you to be present then, as there is one contention in which we are equally interested, and that is that the *Panama* was of "equal or superior force to her captors" and that they are entitled to the entire proceeds.

Even if the *New York* is admitted to share, as having been "in signal distance," she was not a part of the "capturing force," and if we can establish the fact that the *Panama* was of "equal or superior force" to the *Mangrove* the entire proceeds will go to her captors. The *Atalanta*, 2 Fed. Cases, 119. Very truly yours,

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LAW OFFICES OF
JOS. K. MCCAMMON,
JAMES H. HAYDEN,
1420 F STREET, WASHINGTON, D. C.

April 28, 1900.

DEAR SIR. We beg to acknowledge the receipt of your letter of the 23d inst., enclosing your notice in the case of the *Panama*. At the present time it is very doubtful whether we can be present at Jacksonville on the 8th proximo. While we should be glad to have the court hold that the *Panama* constituted a force superior to that of the captors, we fear that such a ruling can not be obtained. First: because the *Panama*, at the time of her capture, was merely a mail steamer, and as such, her guns, while in position, were not in serviceable condition.

Second: because the *New York*, which was within signal distance of the *Mangrove* when the capture was made, was alone superior in force to the *Panama*.

Although the *New York* did not take an active part in the capture, we believe that her presence within signal distance of the *Mangrove* not alone entitled her to share in the prize money but constituted her a part of the capturing force. This is in accordance with the decision of the Supreme Court of the United States in the case of the Iron-clad *Atalanta*, 3 Wall. 434, and other authorities.

If we are not able to appear in Jacksonville on the 8th proximo, we shall submit the case on brief.

Yours very truly,
MCCAMMON & HAYDEN.

JEFFERSON B. BROWNE, Esq.,
Key West Florida.

STATE OF FLORIDA, } ss:
County of Monroe, }

Before me, a notary public duly commissioned and qualified in and for said county and State, personally came Jefferson B. Browne, who being duly sworn deposes and says: that the attached letter was duly received by me from the writers, and in accordance with their request

I raised no objection to the filing of the briefs of the respective counsel, and the same was duly filed.

JEFFN. B. BROWNE.

Sworn to and subscribed before me this 25th day of March, A. D. 1901. J. M. PHIPPS,
[SEAL.] *Notary Public.*

LAW OFFICE OF
GEORGE A. & WILLIAM B. KING,
No. 728 17th Street,
WASHINGTON, D. C., *May 12, 1909.*

T. JEFFERSON BROWNE, Esq.
Attorney at Law,
Care of Clerk, U. S. District Court,
Jacksonville, Fla.

DEAR SIR: We have submitted, on behalf of the *Indiana* and the *Wilmington*, a brief setting forth the grounds of the contention of the *Indiana* and *Wilmington* to share with the *New York* and the *Mangrove* in the proceeds of the *Panama*. On filing this brief a copy of it was sent the clerk of the court for your consideration. We trust that it will be satisfactory to you to raise no objection to the consideration by the court of this brief, as well as that filed by Messrs. McCammon & Hayden on behalf of the *New York*. Yours respectfully,

GEORGE A. & WM. B. KING.